United Nations A/CN.4/L.917

General Assembly

Distr.: Limited
25 May 2018

Original: English

International Law Commission
Seventieth Session
New York, 30 April-1 June and Geneva, 2 July-10 August 2018

Draft report of the International Law Commission on the work of its seventieth session

Rapporteur: Ms. Patricia **Galvão Teles**

Chapter IV
Subsequent agreements and subsequent practice in relation to the interpretation of treaties

Contents

Page

A. Introduction
B. Consideration of the topic at the present session
C. Recommendation of the Commission
D. Tribute to the Special Rapporteur
E. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties
1. Text of the draft conclusions

GE.18-08468 (E) 290518
1808468

Please recycle

A. Introduction

1. The Commission, at its sixtieth session (2008), decided to include the topic "Treaties over time" in its programme of work and to establish a Study Group on the topic at its sixty-first session.[1] At its sixty-first session (2009), the Commission established the Study Group on treaties over time, chaired by Mr. Georg Nolte. At that session, the Study Group focused its discussions on the identification of the issues to be covered, the working methods of the Study Group and the possible outcome of the Commission's work on the topic.[2]

2. From the sixty-second to the sixty-fourth session (2010-2012), the Study Group was reconstituted under the chairmanship of Mr. Georg Nolte. The Study Group examined three reports presented informally by the Chairperson, which addressed, respectively, the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction;[3] the jurisprudence under special regimes relating to subsequent agreements and subsequent practice;[4] and the subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings.[5]

3. At the sixty-fourth session (2012), the Commission, on the basis of a recommendation of the Study Group,[6] decided: (a) to change, with effect from its sixty-fifth session (2013), the format of the work on this topic as suggested by the Study Group; and (b) to appoint Mr. Georg Nolte as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".[7]

4. From its sixty-fifth (2013) to sixty-eighth sessions (2016), the Commission considered the topic on the basis of four successive reports submitted by the Special Rapporteur.[8]

5. At its sixty-eighth session (2016), the Commission adopted on first reading a set of 13 draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, together with commentaries thereto.[9] It decided, in accordance with articles 16 to 21 of its statute, to transmit the draft conclusions, through the Secretary-General, to Governments for comments and observations.[10]

---

[1] At its 2997th meeting, on 8 August 2008. See *Yearbook ... 2008*, vol. II (Part Two), para. 353; and for the syllabus of the topic, *ibid.*, annex I. The General Assembly, in paragraph 6 of its resolution 63/123 of 11 December 2008, took note of the decision.

[2] *Yearbook ... 2009*, vol. II (Part Two), paras. 220–226.

[3] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 344–354; and *ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 337.

[4] *Ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 338–341; and *ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 230–231.

[5] *Ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 232–234. At the sixty-third session (2011), the Chairperson of the Study Group presented nine preliminary conclusions, reformulated in the light of the discussions in the Study Group (*ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 344). At the sixty-fourth session (2012), the Chairperson presented the text of six additional preliminary conclusions, also reformulated in the light of the discussions in the Study Group (*ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 240). The Study Group also discussed the format in which the further work on the topic should proceed and the possible outcome of the work. A number of suggestions were formulated by the Chairperson and agreed upon by the Study Group (*ibid.*, paras. 235–239).

[6] *Ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 226 and 239.

[7] *Ibid.*, para. 227.

[8] A/CN.4/660 (first report), A/CN.4/671 (second report), A/CN.4/683 (third report) and A/CN.4/694 (fourth report).

[9] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), paras. 75–76.

[10] *Ibid.*, para. 73.

B. Consideration of the topic at the present session

6. At the present session, the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/715), as well as comments and observations received from Governments (A/CN.4/712).

7. At its 3390th, 3391st and 3393rd to 3396th meetings, from 30 April to 7 May 2018, the Commission considered the fifth report of the Special Rapporteur and instructed the Drafting Committee to commence the second reading of the entire set of draft conclusions on the basis of the proposals of the Special Rapporteur, taking into account the comments and observations of Governments and the debate in the plenary on the Special Rapporteur's report.

8. The Commission considered the report of the Drafting Committee (A/CN.4/L.907) at its 3406th meeting, held on 18 May 2018, and adopted the entire set of draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties on second reading (sect. E.1 below).

9. At its … to … meetings, on … 2018, the Commission adopted the commentaries to the aforementioned draft conclusions (sect. E.2 below).

10. In accordance with its statute, the Commission submits the draft conclusions to the General Assembly, together with the recommendation set out below.

C. Recommendation of the Commission

11. …

D. Tribute to the Special Rapporteur

12. At its … meeting, held on … 2018, the Commission, after adopting the commentary to the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, adopted the following resolution by acclamation:

"*The International Law Commission*,

"*Having adopted* the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties,

"*Expresses* to the Special Rapporteur, Mr. Georg Nolte, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft conclusions through his tireless efforts and devoted work, and for the results achieved in the elaboration of draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties."

E. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties

1. Text of the draft conclusions

13. The text of the draft conclusions adopted by the Commission, on second reading, at its seventieth session is reproduced below.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties

Part One
Introduction

Conclusion 1
Scope

The present draft conclusions concern the role of subsequent agreements and subsequent practice in the interpretation of treaties.

Part Two
Basic rules and definitions

Conclusion 2
General rule and means of treaty interpretation

1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the recourse to supplementary means of interpretation. These rules also apply as customary international law.

2. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, as provided in article 31, paragraph 1.

3. Article 31, paragraph 3, provides, *inter alia*, that there shall be taken into account, together with the context, (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.

5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.

Conclusion 3
Subsequent agreements and subsequent practice as authentic means of interpretation

Subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) and (*b*), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.

Conclusion 4
Definition of subsequent agreement and subsequent practice

1. A subsequent agreement as an authentic means of interpretation under article 31, paragraph 3 (*a*), is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.

2. A subsequent practice as an authentic means of interpretation under article 31, paragraph 3 (*b*), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.

3. A subsequent practice as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

Conclusion 5
Conduct as subsequent practice

1. Subsequent practice under articles 31 and 32 may consist of any conduct of a party in the application of a treaty, whether in the exercise of its executive, legislative, judicial or other functions.

2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.

Part Three
General aspects

Conclusion 6
Identification of subsequent agreements and subsequent practice

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. Such a position is not taken if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, may take a variety of forms.

3. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

Conclusion 7
Possible effects of subsequent agreements and subsequent practice in interpretation

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.

2. Subsequent practice under article 32 may also contribute to the clarification of the meaning of a treaty.

3. It is presumed that the parties to a treaty, by an agreement or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law.

Conclusion 8
Interpretation of treaty terms as capable of evolving over time

Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.

Conclusion 9
Weight of subsequent agreements and subsequent practice as a means of interpretation

1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, *inter alia*, on its clarity and specificity.

2. In addition, the weight of subsequent practice under article 31, paragraph 3 (*b*), depends, *inter alia*, on whether and how it is repeated.

3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

Conclusion 10
Agreement of the parties regarding the interpretation of a treaty

1. An agreement under article 31, paragraph 3 (*a*) and (*b*), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Such an agreement may, but need not, be legally binding for it to be taken into account.

2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (*b*), may vary. Silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction.

Part Four
Specific aspects

Conclusion 11
Decisions adopted within the framework of a Conference of States Parties

1. A Conference of States Parties, under these draft conclusions, is a meeting of parties to a treaty for the purpose of reviewing or implementing the treaty, except where they act as members of an organ of an international organization.

2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States Parties often provide a non-exclusive range of practical options for implementing the treaty.

3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including adoption by consensus.

Conclusion 12
Constituent instruments of international organizations

1. Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph 3, are, and subsequent practice under article 32 may be, means of interpretation for such treaties.

2. Subsequent agreements and subsequent practice of the parties under article 31, paragraph 3, or subsequent practice under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument.

3. Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31 and 32.

4. Paragraphs 1 to 3 apply to the interpretation of any treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization.

Conclusion 13
Pronouncements of expert treaty bodies

1. For the purposes of these draft conclusions, an expert treaty body is a body consisting of experts serving in their personal capacity, which is established under a treaty and is not an organ of an international organization.

2. The relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable rules of the treaty.

3. A pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or subsequent practice under article 32. Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 (*b*), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.

4. This draft conclusion is without prejudice to the contribution that pronouncements of expert treaty bodies make to the interpretation of the treaties under their mandates.